SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 19106

JOSEPH FORTIN, SAMUEL KOFKOFF, ROBERT KOFKOFF AND KOFKOFF EGG FARM, LLC

V.

HARTFORD UNDERWRITERS INSURANCE CO. and THE NORTH RIVER INSURANCE COMPANY

REPLY BRIEF OF THE PLAINTIFFS-APPELLANTS WITH SEPARATE REPLY BRIEF APPENDIX

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I. STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

Plaintiffs-Appellants Joseph Fortin, Samuel Kofkoff, Robert Kofkoff and Kofkoff Egg Farm, LLC (collectively, the "Kofkoffs")[1] filed their Appellants' Brief on June 3, 2013 ("Kofkoffs' Brief"), pages 1 through 5 of which contains their statement of facts and nature of proceedings. Additional facts are submitted herein in response to North River's Brief ("NR Brief") dated August 29, 2013.

Three insurance policies are relevant in this case: (1) a comprehensive general liability policy with the Hartford, policy period from October 1, 1984 to October 1, 1985 (the "Hartford policy," covering only the October 1984 CNB Advisory Board occurrence) (NRA 824-831); (2) a comprehensive general liability policy with the Home Indemnity Company ("the Home"), policy period from October 1, 1987 to October 1, 1988 (the "Home policy," covering only the February 1987 Schwartz Farm occurrence) (NRA 832-836); and (3) a commercial comprehensive catastrophe liability umbrella policy with North River, policy period from July 31, 1984 to October 1, 1985 (the "North River policy," covering only the October 1984 CNB Advisory Board occurrence) (NRA 837-842).

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[1] Connecticut National Bank instituted a foreclosure action against Julius and Dora Rytman in 1987 (*Connecticut National Bank v. Julius Rytman, et al.* (Docket No. CV 87 505741 S)) ("CNB Action"). (North River Appendix, dated 8/29/13 ("NRA"), 650-651). The Rytmans cited in Joseph Fortin, Samuel Kofkoff, Robert Kofkoff and Kofkoff Egg Farm, LLC (collectively, the "Kofkoffs") as third party defendants to the CNB Action. Id. On May 30, 2003, Kofkoffs commenced the present breach of contract and declaratory judgment action against both the Hartford Underwriters Insurance Company ("Hartford") and the North River Insurance Company (Docket No. HHD X04 CV 03 4033596). (NRA 649-671). While the Kofkoffs are the Plaintiffs-Appellants in the present action, they were defendants in the CNB Action. For clarity, the Plaintiffs-Appellants in this appeal will be referred to herein as the Kofkoffs, the Defendant-Appellee North River Insurance Company will be referred to herein as "North River", and Defendants Julius and Dora Rytman from the underlying CNB Action will be referred to herein as the "Rytmans".

In November of 2001, the Rytmans filed an Amended Cross-Complaint in the CNB Action. The Kofkoffs submitted this amended cross-complaint to the Hartford, which had been providing a defense in the case since March 16, 1991.[2, 3] (NRA 596; RA 31-38). The amended cross-complaint included at least two counts containing allegations that triggered Hartford's duty to defend. Count Seven included allegations within paragraph 10 of said count relating to comments allegedly uttered by Samuel Kofkoff at an October 1984 CNB Advisory Board meeting. Count Twelve incorporated these allegations into a count claiming negligent infliction of emotional distress resulting in physical ailments. (NRA 972, 982-992, 997). Paragraph 10 of Count Seven was incorporated by reference into Counts Eight through Nineteen of the nineteen count operative Complaint. (NRA 972- 1008).

The disparaging remarks allegedly uttered at the CNB Advisory Board meeting in October 1984 by Samuel Kofkoff about the Rytmans served as the catalyst for the downfall of the Rytman businesses. (NRA 188; Appendix 6/3/2013 submitted with the Kofkoffs' Brief ("A") 213-225). Robert Kofkoff testified that Julius Rytman believed his demise started in

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[2] After filing the November 2001 amended cross complaint, the Rytmans filed another amended cross complaint on January 8, 2002. The Kofkoffs notified the Hartford of this complaint; the Hartford again denied coverage or defense. (Kofkoff Reply Brief Appendix, 11/22/13, ("RA") 1). The Rytmans filed a Second Amended Revised Third-Party Complaint on April 24, 2002. (NRA 972-1011). The Kofkoffs notified the Hartford; the Hartford denied coverage or defense. (RA 2-3). The April 24, 2002 Second Revised Amended Third-Party Complaint is the operative complaint.

[3] The law firm of Robinson & Cole served as the Kofkoffs counsel when the Amended Cross Complaint was filed in November 2001. (RA 5). The Kofkoffs, the Hartford and the Home each paid one-third of Robinson & Cole's fees, despite the Kofkoffs' belief that their insurers should have paid the complete costs of defense. (RA 7-8). Notably, the Hartford's defense was not a continuous and uninterrupted affair; the Kofkoffs had at least four different lawyers from five separate law firms defend the case, not including the undersigned. (RA 13-15).

October of 1984, when Samuel Kofkoff allegedly made slanderous comments at the CNB Advisory Board meeting. Subsequent to that meeting, CNB undertook a fraud investigation of the Rytmans and took control of their assets. The Rytmans felt that the loss of their "empire" began with the 1984 CNB Advisory Board meeting. Contrary to North River's assertions, according to the Rytmans, Samuel Kofkoff's alleged comments at that meeting are the central piece of the litigation that has been ongoing for over two decades.[4] (A 247-248, 250-251, 253-269, 271-278, 280-286). They are the very events that the Rytmans claimed precipitated their financial ruin. See Kokfoffs' Brief, 15-16.

Upon receiving notice of the Rytmans' Amended Cross-Complaint of November 30, 2001, the Hartford asserted that the Rytmans did not "allege an Occurrence, Bodily Injury, Property Damage, Personal Injury, or Advertising Injury as defined in the policy." (RA 37). In a January 14, 2002 letter, the Hartford notified the Kofkoffs that it "disclaim[ed] *any and all coverage* as to the Amended Cross-Complaint dated November 30, 2001. The Hartford will not pay or contribute to the defense costs incurred subsequent to the date of the complaint." (RA 38).

On April 4, 2002, the Kofkoffs notified North River of the Hartford's withdrawal and requested North River to honor its contractual obligations under its policy. (RA 39-45). On August 29, 2002, the Kofkoffs notified North River that mediation was planned for September 10, 2002, and requested that it attend. (RA 46-47). After at least two previous mediation attempts to settle the CNB Action, the parties finally settled in September 2002.

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[4] North River ignores the causal connection between the CNB Advisory Board occurrence and the economic ruin Rytman suffered when it claims such ruin resulted from non-covered claims. (NR Brief 3, 22-24).

North River refused to attend the mediation, never participated in the defense and contributed no monies toward the settlement. Id.

The Kofkoffs moved for summary judgment on counts one, three and four, all concerning the respective insurers' duty to defend. The Hartford and North River also moved for summary judgment, claiming they had no duty to defend. On April 6, 2005, the Trial Court (Quinn, J.) held that as a matter of law, North River and the Hartford had a duty to defend the Kofkoffs in the CNB Action and that both had breached their respective duties. (NRA 591, 595-608). The Trial Court held that: "there are at least some allegations in the underlying complaint which possibly fall within Hartford's coverage thereby triggering Hartford's duty to defend." (NRA 600).

As to North River, the Trial Court found the allegations in the underlying Complaint, when compared with the North River's policy provisions, "warrant the conclusion that they possibly fall within coverage and the duty to defend is triggered." (NRA 607). In arriving at the conclusion that North River's duty to defend was triggered, the court looked to the following provision in North River's policy:

> II. DEFENSE SETTLEMENT
>
> With respect to any occurrence covered by the terms and conditions of this policy, but *not covered, as warranted,* by the underlying policies listed in Schedule A hereof or *not covered* by any other underlying insurance *collectible* by the insured, the company shall; (a) defend any suit against the insured alleging such injury or destruction and seeking damages on account thereof..." (NRA 840) (Emphasis added).

The Trial Court held that: "[t]he Hartford, *the underlying policy,* was *not covering the claimed occurrence as warranted* by its policy and it was then incumbent upon North River to defend the Kofkoffs in the CNB action." (NRA 607). (Emphasis added). The Trial Court granted the Kofkoffs' motion for partial summary judgment as to counts one, three and four,

and denied North River's and the Hartford's motions for partial summary judgment as to the same counts. (NRA 591).

On September 29, 2010, the Trial Court (Quinn, J.) issued an Articulation of its April 6, 2005 Decision. (NRA 642-647). Therein, the Court explained why North River was obligated to defend the Kofkoffs despite the continued participation of the Home, which provided partial funding of the defense of the case until it was resolved in September 2002. (NRA 642, 644-47). The Court found that the Home policy covered the 1987 Schwarz farm claim and the Hartford policy covered the 1984 CNB Advisory Board incident. (NRA 644-645). The Home and Hartford had asserted that each company provided coverage for different claims in different policy periods. (NRA 645). The CNB claim was an occurrence that Home had no duty to defend under its contract of insurance because the events clearly occurred outside of its policy period. Id. Because the Home's duty to defend arose out of the separate and distinct Schwarz Farm occurrence, its continued defense of the entire case could not relieve North River of its duty to defend once the Hartford withdrew its defense of the CNB claim. Id.

The Trial Court emphasized that the phrase "not covered, as warranted, by the underlying policies..." was the language that triggered North River's duty to defend. (NRA 645-646). Because "the underlying insurer [the Hartford], did not, **as warranted**, defend the suit, as set forth in its policy language," North River's obligation to defend was triggered. (NRA 646). (emphasis in original) (internal quotations omitted).

II. ARGUMENT

A. Faulkner had a sufficient foundation to render his opinion, and North River failed to meet its summary judgment and preclusion burdens.

1. Preclusion of Faulkner's testimony was improper.[5]

The Kofkoffs have addressed in Kofkoffs' Brief, pages 10-30, the reasons why the trial court committed reversible error in precluding Faulkner's testimony for lack of a sufficient foundation, and in granting summary judgment.

While the Kofkoffs acknowledge that they bear the ultimate burden *at trial* of proving the objective reasonableness of the Kofkoffs' settlement, a burden this court recently articulated and refined in Capstone Building Corp. v. American Motorists Ins. Co., 308 Conn. 760 (2013), it was North River's burden to prove that it was entitled to the relief it requested in both the motions to preclude and for summary judgment.[6] North River failed

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[5] Kofkoffs adequately addressed in Kofkoffs' Brief, pages 6-10, why the plenary standard of review should apply. Nonetheless, if this Court concludes the abuse of discretion standard applies, the trial court violated that standard when precluding Faulkner's testimony. See, e.g., D'Ascanio v. Toyota Industries Corp., 309 Conn. 663 (2013).

[6] See Allstate Ins. Co. v. Barron, 269 Conn. 394, 405-06 (2004) ("...[T]he movant ... has the burden of showing the nonexistence of any issue of fact... The courts hold the movant to a strict standard. To satisfy this burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of fact. ... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent."); Menna v. Jaiman, 80 Conn. App. 131, 138 (2003)("The party who files the motion in limine has the burden of demonstrating that the evidence is inadmissible on any relevant ground.").

to meet these burdens for the reasons stated in Kofkoffs' Brief. The trial court's decision should be reversed.[7,8]

2. The trial court improperly granted North River's motion for summary judgment, dated October 6, 2008.

The Kofkoffs addressed this issue in Kofkoffs' Brief at pages 30-35.

B. The trial court properly held that North River had a duty to defend.

On April 6, 2005, the Trial Court, Quinn, J., held that North River had a duty to defend the Kofkoffs in the CNB Action after the Hartford breached its duty to defend the CNB Action,[9] notwithstanding the continued defense provided by the Home. (NRA 644-647). North River now argues: (1) the CNB Advisory Board incident was not a covered occurrence under its policy (which claim was not raised at the trial or appellate court level) (RA 156-173, NR Brief 23-24); (2) the Home Insurance Company provided a full defense of the Kofkoffs at all relevant times during the CNB Action; (3) the Kofkoffs suffered no harm as a result of the Hartford's and North River's failure to provide a defense; and (4) North

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[7] North River claims the trial court found numerous essential facts about which Faulkner was unaware. (NR Brief 10-11). In fact, the court articulated a far lesser number of facts it considered *essential*, all of which Kofkoffs addressed in their brief. (Kofkoffs' Brief 24-27).

[8] North River's reliance on *Porter* is misplaced. (NR Brief 14). Faulkner's methodology to opine on the objective reasonableness of the settlement in the CNB action included a review of primary source (e.g.,depositions) and secondary source material (e.g. mediation papers), a methodology more comprehensive in scope than that endorsed by North River's expert. (Kofkoffs' Brief 19-22). Moreover, the subject matter of Faulkner's testimony is not the type typically required to meet the *Porter* threshold. See, e.g., Maher v. Quest Diagnostics, Inc., 269 Conn. 154, 167- 171 (2004).

[9] North River does not appear to challenge, on appeal, the Trial Court's finding that the allegations of the November 30, 2001 Amended Complaint possibly fell within the coverage of the Hartford's policy, thus triggering the Hartford's duty to defend.

River's duty to defend can only be triggered if the policies of all underlying primary insurers have been exhausted. (NR Brief 21-30).

1. Standard of Review

"Construction of a contract of insurance presents a question of law for the court[,] which this court reviews de novo." Hartford Cas. Co. v. Litchfield Mut. Fire Ins. Co., 274 Conn. 457, 462-63 (2005).

2. Under the language of its policy, North River's duty to defend was triggered by the Hartford's withdrawal from the defense of the Kofkoffs in the CNB Action.

Whether an insurer has a duty to defend depends not on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, alleged facts which bring the injury within the coverage of the insurance policy. Bd. of Educ. v. St Paul Fire & Marine Ins. Co., 261 Conn. 37, 40-41 (2002). "If an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured." Moore v. Continental Cas. Co., 252 Conn. 405, 409 (2000); Couch on Insurance § 200:10-11 Insurer's Duty to Defend (3d ed. 1997) (duty to defend triggered if there is a possible factual or legal basis on which the insurer could be obligated to indemnify the insured).

Whether an insurer has a duty to defend necessarily entails an analysis and interpretation of the relevant policy provisions specifying what is included in the policy coverage; the policy language controls the outcome. See, e.g. Moore v. Continental Cas. Co., 252 Conn. at 410; Community Action for Greater Middlesex County, Inc. v. Am. Alliance Ins. Co., 254 Conn. 387, 399-401 (2000); Hartford Cas. Co., 274 Conn. at 464-65. North River clearly and unambiguously obligates itself to defend its insured if " ... any

occurrence covered by the terms and conditions of [North River's] policy, [is] not covered, as warranted, by the underlying policies listed in Schedule A hereof or not covered by any other underlying insurance *collectible* by the insured ... ." (NRA 840).

a. Samuel Kofkoff's remarks to the Rytmans' bank concerning their financial condition qualify as an occurrence covered under North River's insurance policy.

"Occurrence means:

a. With respect to Bodily Injury Liability or Property Damage Liability, injurious exposure to conditions which results in Bodily Injury or Property Damage neither expected nor intended from the standpoint of the insured.
...
b. With respect to Personal Liability Liability, an offense which results in Personal Injury, other than an offense committed with actual malice or the willful violation of a penal statute ..." (NRA 841-842).

Samuel Kofkoff negligently remarked to CNB Advisory Board members (the Rytmans' bank) about the Rytmans' perceived deteriorating financial condition, causing CNB to conduct a fraud investigation and ultimately turn off its financial spigot to the Rytmans. Without adequate financing, the Rytmans' businesses failed. Samuel Kofkoff's conduct caused the Rytmans emotional distress and physical injury. (NRA 983-984, 997; A 213-225). Mr. Kofkoff did not intend his comments to hurt the Rtymans, instead he simply wished to protect his position with CNB, with whom the Kofkoffs also banked. (RA 72-73; NRA 188). Judge Quinn succinctly and accurately set forth the basis on which Samuel

Kofkoff's remarks are at least possibly a covered occurrence[10] under both the Hartford and North River insurance policies.[11] (NRA 602-604, 607).

Having established the CNB Advisory Board incident was a covered occurrence, the next question is whether North River had a duty to defend after the Hartford wrongfully withdrew its defense.[12] Schedule A of the North River policy lists a Home Indemnity Company policy, which only covered the period from 2/1/1984 to 10/1/1984, a time frame

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[10] A covered occurrence is one for which North River agrees to pay the Kofkoffs the ultimate net loss in excess of the retained limit which the Kofkoffs may sustain by reason of the liability imposed upon them by law for bodily injury liability, personal injury liability or property damage liability. (NRA 839).

[11] North River now claims for the first time that the CNB Advisory Board incident is not an "occurrence" under its policy, a claim not raised in its summary judgment pleadings or in its Appellate Court brief. (NR Appellate Court Brief, 27-36; NR Brief 23-24; RA 156-173). This Court need not review North River's newly raised claim. See, e.g., Kervick v. Silver Hill Hospital, 309 Conn. 688, 722 (2013); In Re Azareon Y., 309 Conn 626, 634-5 (2013). Assuming arguendo such claim was preserved, North River's reliance on Waller v. Truck Ins. Exch., 32 Cal. Rptr. 2d 692 (Cal.Ct.App. 1994), aff'd 11 Cal 4th 1 (1995), to assert "the damages alleged in the Rytmans' underlying complaint here flowed from intangible property losses that could not be considered covered occurrences under the North River policy" is misplaced. (NR Brief 23-24). The Waller complaint included no counts sounding in negligence. Waller, 11 Cal 4th at 11. Rytman, however, asserted in his operative complaint and mediation submissions that Samuel Kofkoff negligently made disparaging comments about him at a CNB Advisory Board meeting and said conduct caused Rytman severe emotional distress with resulting physical injury. (NRA 188, 982-984, 997). The Waller complaint alleged intentional, not negligent, infliction of emotional distress, allegations clearly not a covered occurrence. Id. at 11. Moreover, the Waller insurance policy did not provide personal injury coverage to the insureds, North River's policy does. Id. (NRA 839-841). It is this personal injury coverage on which Judge Quinn relied, in part, to conclude that North River breached its duty to defend. (A 37-38). Judge Quinn's decision that the operative complaint alleged at least one "occurrence" that may have been "covered by North River's policy" is sound and should stand. (NRA 602-604, 607).

[12] The applicable policy language reads: With respect to any occurrence covered by the terms and conditions of this policy, but *not covered, as warranted,* by the underlying policies listed in Schedule A hereof or *not covered* by any other underlying insurance *collectible* by the insured, the company shall; (a) defend any suit against the insured alleging such injury or destruction and seeking damages on account thereof..." (NRA 840; emphasis added).

before the CNB Advisory Board incident of mid-October 1984. (RA 48). The Hartford policy, the successor to the 1984 Home policy, was operative from 10/1/1984 to 10/1/1986 and covered, under its terms, at least some of the allegations in the operative complaint. (NRA 595-604, 824-831).[13] Therefore, the Hartford had *warranted,* by the terms of its policy, to cover the type of occurrences alleged in Count Twelve, which incorporated by reference the CNB Advisory Board allegations of Count Seven. Despite such warranty, on January 14, 2002, the Hartford wrongfully withdrew its defense in the CNB Action. (RA 31-38).

When the Hartford's wrongfully withdrew its defense in the CNB Action, the CNB Advisory Board occurrence was no longer "covered by any other underlying insurance *collectible* by the insured." (NRA 840; emphasis added). North River's duty to defend is defined by relation to a particular *occurrence,* not by relation to "case" or "action." (NRA 840). Therefore, where no other insurance policy covers an *occurrence* that North River's policy covers, its duty to defend is triggered, regardless of whether another policy covers a separate occurrence alleged in the same complaint.[14] This principle is consistent with

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[13] The Trial Court held that the negligent acts alleged in the operative complaint, Count Twelve, which incorporated the allegations of Count Seven, combined with the alleged resulting emotional distress and physical ailments, were sufficient to trigger the Hartford's duty to defend under both the bodily injury and personal injury liability coverages. (NRA 602-604). North River has not attacked this portion of Judge Quinn's decision on appeal. At a time after Judge Shapiro granted North River's motion for summary judgment, Hartford paid $500,000, its policy limit, to settle its litigation with the Kofkoffs. (NRA 128-130, 844, line 10).

[14] The U.S. District Court of Oregon explicitly rejected North River's argument in a factual context that is strikingly similar to the one at bar. In Northwest Pipe Co. v. RLI Ins. Co., the court considered a case where an action implicated coverage under the policies of multiple primary insurers. 734 F. Supp. 2d 1122 (D. Or. 2010). The plaintiff insured sought a declaratory judgment that the excess umbrella insurer, RLI, was obligated to defend. The language triggering RLI's duty to defend was almost identical to that of North River's policy. Id. at 1125. The Court held that RLI contends it does not have any duty to defend Plaintiff under its policy because other insurers also are defending Plaintiff in connection with their

Connecticut law. See, e.g. QSP V. Aetna Cas. & Surety Co., 256 Conn. 343, 352 (2001) ("[i]t is well established...that a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a *covered occurrence*) (emphasis added). This occurrence-based trigger, particularly in view of controlling authority in this jurisdiction, confirms further that Home's presence, based on a separate occurrence, is irrelevant. The Trial Court correctly observed as much, concluding that "there was an *occurrence* which Hartford had a duty to defend, *separate and distinct* from the Schwartz Farm 1987 claim occurrence which triggered Home's duty to defend." (NRA 645).[15]

The word "collectible" is not expressly defined in North River's policy. In Republic Ins. Co. v. North Am. Philips Corp., the Court interpreted the meaning of "collectible" in a policy of excess umbrella liability insurance. 4 Conn. L. Rptr. 331 (1991)(Purtill, J.)(RA 49-54). In a case of first impression, the court held that "the better reasoned decisions [in other jurisdictions] indicate that the use of the phrase...'collectible insurance', as used in the policies in question, indicates an intent that the policies should drop down." Id. The Court observed that "[w]hen an excess insurer uses the term 'collectible' or 'recoverable' it is agreeing to 'drop down' in the event that the primary coverage becomes uncollectible or

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insurance policies for the period at issue. RLI, however, confuses the duty to defend with the duty to indemnify. RLI's policy clearly defines its duty to defend in terms of an *occurrence* covered by underlying insurance. An occurrence is defined in terms of an event triggering indemnification rather than defense. Id. at 1130. The court held that "[w]hether other insurers also defend this action *is not relevant to RLI's duty to defend under the terms of its policy.*" Id. at 1131 (emphasis added).

[15] This court recently noted in an insurance coverage dispute matter that "overlapping coverage does not negate a commercial general liability policy's express terms. The policy covers what it covers. No rule of construction operates to eliminate coverage simply because similar protection may be available through another insurance contract." Capstone, supra., 308 Conn. at 791. Simply because the Home, on a separate occurrence, must provide a defense does not operate to eliminate North River's duty to defend under its own policy.

unrecoverable. Hence our case law dictates that 'recoverable' does not even fall within the category of ambiguous terms; its meaning is *fixed in favor of the insured.*" Id.

Even if the Hartford had *not* withdrawn its coverage, other courts have held that an insurer in North River's position, and bound by identical policy language, would have had a duty to defend because the quantum of damages alleged exceeded the limits of the underlying policy, thus rendering the occurrence "not covered as warranted" by that underlying policy and "pleading into" the coverage of North River's excess policy.[16] However, once the Hartford refused to defend, i.e., deny coverage, as it had promised – "warranted"- to do, North River's duty was unquestionably triggered, requiring it to defend the entire complaint alongside the Home.

It is apparent that neither the Home nor the Hartford policies can be considered "underlying insurance *collectible* by the insured." The Hartford had expressly disclaimed coverage and refused to defend. The Home's policy period was outside the time frame for the October 1984 CNB Advisory Board events. Thus, although the Home policy may be a primary policy with respect to an unrelated occurrence alleged in the complaint, it was *not*

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[16] See, e.g., Cambridge Mutual Fire Ins. Co. v. Ketchum, 2012 WL 3544885 (2012) ("[E]xcess carrier has duty to defend where there is a reasonable possibility that a defendant's excess coverage may be reached despite the fact that primary insurer has undertaken the defense as well."), (RA 55-61). This decision includes a thorough discussion of how the various jurisdictions differ on this issue. Judge Bryant concluded the minority position should prevail. Id. at 6. She defined "covered" within the policy provision "not *covered* by any primary insurance" to include fact scenarios where the quantum of damages alleged exceeded the limits of the underlying policy, thus rendering the occurrence "not *covered* as warranted" by the underlying policy and "pleading into" the coverage of North River's excess policy. Id. This alternative basis to trigger North River's duty to defend further defeats North River's mistaken reliance on Home's continued defense of Kofkoff in the CNB action based on an unrelated occurrence. The quantum of damages alleged against the Kofkoffs in the CNB Action exceeded $52 million, not including punitive damages, an amount far greater than the Hartford's policy limit of $500,000. (RA 98-103; NRA 128-130, 225).

"collectible" by the insured, the Kofkoffs, relative to the 1984 CNB occurrence. Therefore, because the CNB Advisory Board occurrence was covered by the terms and conditions of the North River policy, but *not covered, as warranted,* by the underlying policies listed in Schedule A hereof or *not covered* by any other underlying insurance *collectible* by the insured, North River had to defend the Kofkoffs in the CNB Action. (NRA 840). Its failure to defend constituted a breach of its contractual duty.

Connecticut jurisprudence is clear: "an insurer has a duty to defend a claim against its insured unless it can establish as a matter of law that there is *no possible factual or legal basis* on which [the insurer] might *eventually* be obligated to indemnify [the] insured under *any policy provision...*" R.T. Vanderbilt Co., Inc. v. Continental Cas. Co., 273 Conn. 448, 472-73 n. 28 (2005) (citing Ostrager & Newman, Insurance Coverage Disputes § 5.02 at 204 (12th ed. 2004)). Thus, even the specter of eventual indemnity triggers an excess insurer's duty to defend. No underlying insurer was "covering" the occurrence "as warranted," and certainly no insurance "collectible" by the Kofkoffs was covering the CNB Advisory Board occurrence; moreover, from the inception of the action, it was evident that due to the staggering amount of the damages claimed, North River would possibly have to indemnify the Kofkoffs. (NRA 225).

b. Participation of the Home is irrelevant.

(i) North River's duty to defend does not depend on exhaustion of all existing primary policies.

North River argues in its brief that "[i]t is a fundamental principle of insurance coverage law that an excess insurer does not have a duty to defend when there is a primary insurer whose policy has not been exhausted and who is providing a defense to the same case." (NR Brief 26). North River relies on no relevant Connecticut authority to

support this "fundamental principle," and instead cites a lengthy list of treatises and case law from other jurisdictions. (NR Brief 26, n. 38).

Most of the Courts in the various cases cited by North River begin their analysis by interpreting the language of the relevant insurance policy. The courts holding that an excess insurer's duty to defend was triggered only upon *exhaustion* of all underlying primary insurance did so because it was mandated by the language of the policy.[17] Therefore, these cases do not represent a laundry list of jurisdictions subscribing to the idea that where any primary insurer whose policy has not been exhausted is defending an action, no excess insurer can be held to have a duty to defend. Rather, these cases represent the same judicial exercise that this court must undertake: an interpretation of the language of the insurance policies at issue to determine what coverage the insured reasonably expected and what coverage the insurer agreed to provide.

Some of the cases cited by North River, in fact, stand for an altogether different principle. For example, in Continental Casualty Co. v. Synalloy Corp., the District Court for the Southern District of Georgia stated that:

> [w]ith respect to Continentals' argument that an excess insurer has no duty to defend those claims being defended by a primary insurer, "the general rule is

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[17] See, e.g. Community Redevelopment Agency v. Aetna, 50 Cal. App. 4th 329, 332 (1996) (considering whether "under policy provisions such as those presented," excess insurer had a duty to drop down and defend common insured prior to exhaustion); Signal Companies, Inc. v. Harbor Insurance Co., 612 P.2d 889 (1980) excess policy expressly provided that "coverage would not attach until either the primary insurer had admitted liability or the insured had been adjudge liable and the full primary exposure had been paid and satisfied."); Occidental Fire & Cas. Co. v. Underwriters at Lloyd's, 311 N.E.2d 330, 335 (Ill. App. 1974) (Excess insurer "agreed [in its policy] only to pay judgments in excess of the primary insurer's limits up to its own limits. It did not....agree to defend the assured or to share in the costs of defense); Dexter Corp. v. Nat'l Union Fire Ins. Co., No. 3:95CV00702, 1997 WL 289677, at *1 (D. Conn. Mar. 12, 1997) (determination of whether excess umbrella policy had to drop down depend[ed] on legal effect of the excess insurance policy's contractual language, including underlying policy language..."). (RA 62-66).

> that an excess liability insurer is not obligated to participate in the defense until the primary policy limits are exhausted. *But if the primary insurer denies coverage, the excess insurer would be obligated to defend.*

Continental Cas. Co. v. Synalloy Corp., 667 F. Supp. 1523, 1540 (S.D. Ga. 1983) (emphasis added) (citing 14 Couch on Insurance 2d § 51:36, at 446).

(ii) Two insurers may have concurrent and simultaneous duties to defend the same action where occurrences covered by two separate insurance policies are alleged.

North River's claim that it had no duty to defend while the Home, a primary insurer, was also defending is tantamount to a claim that there cannot be two insurers with concurrent and simultaneous duties to defend. Such a position is inconsistent with the well-recognized concept that two co-primary insurers may have concurrent duties to defend such that even where one primary insurer is defending, the other primary insurer still has a *duty* to defend. Cargill, Inc. v. Ace Am. Ins. Co., 784 N.W.2d 341, 351 (Minn. 2010); Fred Shearer & Sons, Inc. v. Gemini Ins. Co., 240 P.3d 67, 78 (Or. App. 2010); Regal Homes, Inc. v. CNA Ins. Co., 171 P.3d 610, 619-20 (Ariz. Ct. App. 2007); see also 22 Pep. L. Rev. 1373, 1425 (1995) ("[a] plaintiff's complaint or petition may trigger more than one concurrent insurer's duty to defend").

The concept of co-primary insurers is also essentially the premise underlying the Connecticut Supreme Court's decision in Security v. Lumbermen's Mutual Casualty Co., wherein the Court held that lawsuits that "implicate multiple insurance policies," the costs of defense should be allocated, *pro rata,* among those insurers whose policies are implicated and who, accordingly, have a duty to defend the claims. 264 Conn. 688, 710 (2003). The Hartford and the Home contributed pro rata towards the Kofkoffs' defense costs for many years before the Hartford wrongfully withdrew its defense. (RA 7-8). After the Hartford

wrongfully withdrew its defense, North River had an obligation under *its* policy to defend alongside the Home. See Couch on Insurance 3d §200:38 ("Once an excess carrier's obligation to defend arises, the duty to defend is the same as the duty of a primary insurer"); see also Universal Underwriters Ins. Co. v. Allstate Ins. Co., 592 A.2d 515, 517 (N.H. 1991).

iii. The Kofkoffs need not prove harm as a condition precedent to a grant of summary judgment on North River's duty to defend.

North River reasons that because the Home continued to provide the Kofkoffs with a defense in the CNB Action after the Hartford's wrongful withdrawal, the Kofkoffs suffered no harm by its refusal to defend the *occurrence* for which it and the Hartford were the only insurance companies providing coverage. (NR Brief 29). North River, however, cites no authority whatsoever that requires a finding of harm to the insured in order to hold that an insurer has breached its duty to defend. Moreover, in making this argument, North River implicitly asks this Court to disregard a *fundamental* holding of the Connecticut Supreme Court in Missionaries of the Company of Mary v. Aetna Casualty & Surety Co., 155 Conn. 104, 114 (1967) ("Missionaries"). In that case, our Supreme Court held that an insurer should not be permitted "to cast upon the plaintiff the difficult burden of proving a causal relation between the defendant's breach of the duty to defend and the results which are claimed to have flowed from it." Id.

Even if a finding of harm were required as a condition precedent to a ruling that an insurer breached its duty to defend, the Kofkoffs were, in fact, harmed by North River's breach. In light of Hartford's wrongful withdrawal and North River's refusal to defend and/or indemnify, the Kofkoffs were left completely exposed relative to the October 1984 CNB

Advisory Board occurrence. Robert Kofkoff testified that he was "frightened that at the moment that I needed my defenders the most, they were abandoning me or threatening to leave...I was facing potential judgment of approximately 150 million dollars."[18] (RA 16). Robinson & Cole, the Kofkoffs' counsel in the underlying action, also informed them that, in light of the coverage dispute between them and the Hartford, it "didn't know if [it] could go forward being [the Kofkoffs'] defense counsel in the Rytman versus Kofkoff...actions." (RA 11). When they requested that their counsel, Robinson & Cole, pursue "all possible legal remedies to get the Hartford to come back in and defend [them] and participate in the settlement," Robinson & Cole refused, citing a conflict of interest because the Hartford was its client.[19] (RA 10-12). Consequently, the Kofkoffs were compelled to retain separate counsel, in part, to contest the denial of coverage.

At the September 2002 mediation, the Home agreed that it would contribute $650,000 towards the settlement of all claims alleged in the operative complaint. The Kofkoffs were left to pay the remaining $2.5 million out of their own funds. Robinson & Cole, which had served as counsel to the Kofkoffs in the CNB Action, claimed a conflict of interest after Hartford's withdrawal and placed its allegiance with the Home and the Hartford by refusing to represent the Kofkoffs in the insurance coverage dispute with the Hartford and by refusing to negotiate a settlement with the Home at the CNB Action

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[18] Robert Kofkoff also feared that the Rytmans would make very convincing and sympathetic witnesses at trial. He described Dora Rytman as a "highly educated, very articulate individual" with "great communication skills." (RA 28-29).

[19] Contrary to North River's assertions that the Kofkoffs had no concerns about the quality of representation it received from counsel, including Robinson & Cole, Robert Kofkoff expressed grave concern about the loyalty, or lack thereof, he received from his lawyer due to Robinson & Cole's previously undisclosed relationship with the Hartford and Home Insurance companies. (RA 9-18, 28).

mediation.[20] (RA 17-18). Hartford and North River's wrongful refusal to participate in the mediation left the Kofkoffs financially exposed. The Hartford's withdrawal, and Robinson & Cole's subsequent assertion of a conflict, also left the Kofkoffs with a lack of faith in that firm's future representation of them in the CNB Action. (RA 11-13). Thus, even if a finding of harm were required to find a breach of the duty to defend, a theory not supported in North River's policy of insurance or the law, the Kofkoffs were harmed by Hartford's withdrawal and North River's subsequent failure to defend them.[21]

C. Missionaries, as refined by Capstone, supports the Trial Court decision that North River breached its duty to defend.

This court recently reaffirmed the validity of Missionaries, so it is irrelevant if its finding represents a claimed minority position. (NR Brief 31-35.); Capstone, supra. at 308 Conn. 760 (2013). Understandably, North River now fears the consequences of its wrongful breach. Simply put, the potential consequence to North River is the payment of what constitutes "the reasonable allocation of the settlement amount and associated costs in proportion to the claims for which ... [it] had an independent duty to defend. Capstone,

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[20] Robert Kofkoff testified that Robinson and Cole refused to represent the Kofkoffs in negotiating a settlement with the Home during the September 2002 mediation, claiming a conflict of interest because the Home, like the Hartford, was the firm's client. (RA 17-18). Instead, the Kofkoffs incurred additional defense costs to retain the undersigned, Attorney Matthew E. Auger, to participate in the September 2002 mediation, including negotiating an agreement with the Home to contribute $650,000 towards the CNB settlement. (RA 17). North River's argument that "the law firm assigned to provide the defense (Robinson & Cole) did not desist, in any way, in its obligations because of the Hartford's withdrawal" is thus simply inaccurate. (NR Brief 29-30).

[21] Sound public policy considerations should compel this court to reject North River's position of essentially "no harm, no foul." Where two insurers have concurrent duties to defend a complaint because it pleads into the coverage of both of their policies, *both* insurers face potential indemnity exposure. If only one participates in the defense of the common insured, the non-participating insurer gets a windfall. Allowing North River to breach its duty to defend without consequence sets a precedent that encourages a breach of the duty to defend.

supra. 308 Conn. at 818. Further, "where 'an apportionment is impracticable because the claims arise from a common factual nucleus and are intertwined,' however, the court may order the full recovery of reasonable attorney's fees and settlement costs." Id. at 818, n.64., citing Total Recycling Services of Connecticut, Inc. v. Connecticut Oil Recycling Services, LLC, 308 Conn. 312, 333 (2013). See discussion supra. at pp. 2-3, 9-10.

III. CONCLUSION AND STATEMENT OF RELIEF REQUESTED

The Kofkoffs respectfully request that the trial court's decision of February 19, 2009 be reversed and remanded with directions that North River's motions to preclude (#233) and for summary judgment (#234) be denied in their entirety. The Kofkoffs further respectfully request that this Court affirm the trial court's April 6th, 2005 decision in its entirety holding that North River had a duty to defend.

RESPECTFULLY SUBMITTED
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CERTIFICATION PURSUANT TO PRACTICE BOOK § 62-7 & 67-2

The undersigned hereby certifies that the foregoing Reply Brief and the accompanying Reply Brief Appendix have been prepared, served and filed in compliance with Practice Book §§ 62-7 & 67-2, to wit:

- An original and 25 copies have been delivered to the Appellate Clerk;
- Copies have been sent to all counsel of record and the trial court judge;
- The font is double spaced and 12-point Arial, with exception of footnote which are single spaced 12-point Arial;
- The margins are at least left 1.25", right 0.5", top and bottom are 1.0"; and
- In light of the fact that this is a Supreme Court case, an electronic version of the Brief has been submitted to the Court in accordance with guidelines established by the Court on electric submission in addition to the paper copy that has been filed with the Court.

Matthew E. Auger
Commissioner of the Superior Court

CERTIFICATION

I hereby certify that on this the 22nd day of November, 2013, I have mailed a copy of the foregoing via U.S. first class mail, postage prepaid, to the following:

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